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NO. 83-976

In the Supreme Court of the United States

OCTOBER TERM, 1983

HOSPITAL SERVICE ASSOCIATION
OF NEW ORLEANS, INC.

Petitioner,

VERSUS

ST. BERNARD GENERAL HOSPITAL, INC.

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Fifth Circuit err in holding that the District Court was clearly erroneous in granting Blue Cross's Motion for Involuntary Dismissal [F.R.C.P. 41(b)].

2. Was the Fifth Circuit correct in finding that St. Bernard made a *prima facie* showing of a *per se* price fixing violation.

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Respondent, St. Bernard General Hospital, Inc. ("St. Bernard"), respectfully prays that the Petition for a Writ of Certiorari should be denied.

SUMMARY OF THE PROCEEDINGS BELOW

In 1971, St. Bernard filed suit against Hospital Service Association of New Orleans, Inc. ("Blue Cross") for violations of §1 of the Sherman Act (15 U.S.C. §§1, 15) alleging, *inter alia*, that it was forced to contract with Blue Cross due to its dominance in the health insurance market, and that said contract was in restraint of trade. St. Bernard was not allowed "participating hospital" status; therefore, the contractural reimbursement formula imposed upon it had financially ruinous effects.

The district court, in 1974, granted summary judgment in favor of Blue Cross, finding that St. Bernard could not show an effect on interstate commerce. That ruling was reversed by the Fifth Circuit Court of Appeals in 1975 (510 F. 2d 1121). On remand, the same district court dismissed the suit again, finding that Blue Cross's activities were exempt from antitrust scrutiny by virtue of the McCarran-Ferguson Act (15 U.S.C. §§1011-1015). Once again, the Fifth Circuit reversed and remanded [618 F. 2d 1140 (1980)].

Trial was finally held on December 21 and 22, 1981. At the close of plaintiff's case, the trial court granted Blue Cross's motion for involuntary dismissal [F.R.C.P. 41(b)]. The court found that the provider agreement between St. Bernard and Blue Cross was not in violation of the antitrust laws, and that the alleged restraints under the contract were not shown to have substantially affected interstate commerce and, therefore, there was lack of jurisdiction under the Sherman Act.

On appeal, the Fifth Circuit reversed and remanded [712 F. 2d 978 (1983)]. The Fifth Circuit carefully analyzed the evidence adduced at trial, as well as the trial court's reasons for ordering the involuntary dismissal. It found that the trial courts findings of fact and application of law were "clearly erroneous," and that the involuntary dismissal was inappropriate, applying the standard of review in *Weissinger v. U.S.*, 423 F. 2d 795 (5th Cir. 1970) (en banc).

STATEMENT OF THE CASE

Blue Cross of New Orleans was organized in 1933 by representatives of four large hospitals in the New Orleans

area, and, by the late 1960's, five more large hospitals joined their ranks as "participating hospitals." These hospitals entered into contracts with Blue Cross termed "participating hospital agreements." Pursuant to these contracts, the participating hospitals agreed to provide health care services to Blue Cross policy holders ("subscribers") for which the hospitals would receive 100% reimbursements from Blue Cross. In the event that Blue Cross reserves became inadequate to satisfy claims, the participating hospitals agreed to "underwrite" any losses.[1]

The articles of incorporation of Blue Cross provides that the "participating hospitals" are to designate two representatives each to Blue Cross's Board of Directors, and that those members would select the remaining directors. During the time relevant to this litigation, there were thirty-one members on the Board. Therefore, the "participating hospitals" representatives constitute a simple majority of the Board, and they control the selection of the remaining "at large" members.

To be considered for "participating hospital" status, a hospital must be non-profit, community oriented, and approved by the Joint Commission on Accreditation of Hospitals (J.C.A.H.).

St. Bernard, a thirty-nine bed, proprietary hospital in suburban New Orleans, first contracted with Blue Cross in 1960. Since it was not a non-profit hospital, its contract fell into a separate category known as a "contracting hospital

[1]Only once were the "participating hospitals" called upon to accept less than full reimbursement. In 1934, there was a $13,000 deficit which the original four hospitals contributed to eliminate. Every other year Blue Cross enjoyed a healthy surplus.

agreement." During the time period relevant to this litigation (1969-1972), a "contracting hospital" was obligated to furnish health care services to Blue Cross "subscribers," and was reimbursed for its usual, customary and reasonable charges, pursuant to a formula which was not applicable to the "participating hospitals." St. Bernard's reimbursement from Blue Cross was limited to the average amount paid to a "participating hospital" for a similar illness or length of stay. In practice, Blue Cross reimbursed St. Bernard during the year for all its claims just as it would to a "participating hospital." However, at the end of the year, Blue Cross performed an accounting and demanded a partial refund of monies paid to St. Bernard during the year. As stipulated in the proceeding below, St. Bernard refunded $147,610.70 to Blue Cross for the years 1969-1972.

REASONS FOR DENYING THE WRIT

The facts of the instant case are unique to the health care industry in New Orleans and are not of national importance. As found by the Fifth Circuit, Blue Cross, in the New Orleans area, is controlled by nine major local hospitals, which constitute majority membership on the Board of Directors of Hospital Services Administration of New Orleans, Inc. (H.S.A.). H.S.A. is licensed to use the Blue Cross name and symbol in connection with the marketing of health insurance.

The Fifth Circuit correctly discerned the fact that Blue Cross is effectively controlled by the "participating hospitals," and that its refusal to deal with St. Bernard on fair and equal terms, together with the horizontal price fixing results of its contract with St. Bernard, constitute a *per se* violation of the Sherman Act (15 U.S.C. §§1, 15).

There are no other pending actions of this type before the district court, as alleged by Petitioner on page 9 n. 3, of its brief. Shortly after its petition was filed, those other actions were all settled amicably. To the best of Respondent's knowledge, Petitioner has yet to inform this Honorable Court concerning this important development, upon which it placed such emphasis in its petition.

ARGUMENT

1. DID THE FIFTH CIRCUIT ERR IN HOLDING THAT THE DISTRICT COURT WAS CLEARLY ERRONEOUS IN GRANTING BLUE CROSS'S MOTION FOR INVOLUNTARY DISMISSAL [F.R.C.P. 41(b)]?

The decisive question before this Honorable Court is whether the Fifth Circuit Court of Appeal applied the appropriate standard of review in reversing the trial court's Rule 41(b) involuntary dismissal and remanding for trial.

Since this matter was tried before a judge rather than a jury, the Fifth Circuit had to determine if the trial court was clearly erroneous in his appreciation of the facts and his application of law. *Weissinger, supra.*

Recognizing this standard of review, the Fifth Circuit embarked on a categorical analysis of the trial court's reasons for judgment, and found each count to be clearly erroneous.

Regarding the trial court's finding that the activity complained of did not substantially affect commerce, the Fifth Circuit found:

> "Undisputed evidence in the record shows that St. Bernard purchased much of its supplies from out-of-state suppliers and from out-of-state manufacturers. The economic damage that St. Bernard alleges obviously affected these transactions, whether directly in terms of St. Bernard's ability to purchase supplies or indirectly in terms of its general economic strength and viability. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 965 ct. 1848, 48 L. Ed. 338 (1976)." 712 F. 2d 978, 984.

Indeed, for the interstate commerce allegations of a Sherman Act complaint to be jurisdictionally sound, they must allege either "(1)activities that are in the flow of interstate commerce, or (2) activities which, though occurring purely on a local level, substantially affect interstate commerce." *Doctors, Inc. v. Blue Cross of Greater Philadelphia*, 490 F. 2d. 48,50 (3rd Cir. 1973). At the very least, St. Bernard proved that its activities were an integral part of interstate commerce, as is the entire health care industry.

In addressing the trial court's finding that there was no "antitrust injury" shown, the Fifth Circuit pointed out the obvious fact that as a direct result of the disparate treatment afforded St. Bernard by their provider agreement, it suffered economic injury in the amount of $147,610. These damages are indicative of Blue Cross's refusal to deal with St. Bernard on similar terms as the "participating hospitals," therefore, the trial court's finding could not pass muster.

2. WAS THE FIFTH CIRCUIT CORRECT IN FINDING THAT ST. BERNARD MADE A *PRIMA FACIE* SHOWING OF A *PER SE* PRICE FIXING VIOLATION?

The Fifth Circuit recognized that St. Bernard placed

great emphasis on its allegation of illegal price-fixing. By its very terms, the "contracting hospital agreement" fixes the price of hospital services by controlling the amount that is reimbursed through the formula devised by Blue Cross. By contrast, a "participating hospital" will be reimbursed for 100% of its charges regardless of its relationship to the "average per illness or per stay" of all the "participating hospitals."

Regardless of whether there are beneficial, pro-competitive justifications, an agreement which fixes prices is *per se* illegal under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

Most recently, this Honorable Court addressed price-fixing in the context of the health care industry in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d. 48 (1982). In *Maricopa*, the defendants were a county medical society of licensed medical doctors and two "foundations for medical care" which were non-profit corporations composed of licensed medical doctors. The foundations established a maximum fee schedule for medical services to be charged by the doctor-membership to patients insured by foundation-endorsed health care "insurers." In order to obtain the foundation's endorsement, the "insurers" had to agree to pay up to the maximum fee schedule for services furnished to their insured; the doctors had to agree to accept said payment as full payment for their services.

Whereas this Honorable Court acknowledged that consumers might benefit from such a contract inn the containment of escalating medical costs, the practice was declared to be *per se* illegal price fixing. The "rule of reason" test was abandoned in favor of precision and judicial economy.

In its analysis of *Maricopa*, the Fifth Circuit found that it did not control the case sub judice, in that *Maricopa* was a "horizontal" agreement among the doctor-membership of the foundations, whereas St. Bernard was more akin to a "vertical" one between purchaser (Blue Cross) and supplier (St. Bernard).

Respondent submits that the peculiar factual context of this case causes the agreement under scrutiny to seem more "horizontal" than "vertical." The true purchasers in this case are the patients. St. Bernard and its competing hospitals, including the "participating hospitals," whose alter ego *is* Blue Cross, are the suppliers. The commodity being bought and sold is health care service, and the price for such commodity would be set by normal market forces, if left unrestrained. However, under the "contracting hospital agreement" forced upon St. Bernard by Blue Cross, which is controlled by its competitors (the "participating hospitals"), the ultimate result is price fixing as the result of a horizontal agreement.

At all events, the Fifth Circuit went on to state:

> "The foundation of doctors in *Maricopa* made no attempt to contain prices to outside, non-member physicians. In todays case, by contrast, [Blue Cross] has tried to contain prices only as to outsiders and is not limiting reimbursement to its own board members through the cost ceilings. Thus in this sense, this case presents a more egregious scheme of anticompetitive behavior than even *Maricopa*. It imposes burdens on outsiders but not upon the insiders who create the rules." 712 F. 2d. 978, 987. (Emphasis supplied).

Within the foregoing quotation can be found the

thrust of the Fifth Circuit's decision, and its true understanding of the facts of this case, despite what is contended by Blue Cross in its petition for writs. Blue Cross would have this Honorable Court believe that the Fifth Circuit made a giant "inferential leap" from finding that since Blue Cross's Board membership was chosen by the "participating hospitals," to assuming that there was an unlawful combination to fix prices. Blue Cross would also have this Honorable Court believe that the facts presented by this case involve a simple, vertical, buyer-seller arrangement, in which the price of medical care is not fixed to the third-party patient.

In truth and in fact, it is no mere coincidence that Blue Cross is composed of and controlled by representatives of the "participating hospitals," and that those same "participating hospitals" are afforded a contractural status which allows them 100% reimbursement of all their charges to patients, whatever they may be. It is this "alter ego" relationship between Blue Cross and the "participating hospitals" which negates Petitioner's characterization of it as merely "buyer-seller." Thus, the Fifth Circuit was able to distinguish the instant case from legal, vertical provider agreements, such as *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

Blue Cross urges that provider agreements, such as the one under attack, have not been deemed price fixing since they do not specifically establish the price to be paid by the third-party consumer. (p. 13, Petitioner's Brief). Cited are *Medical Arts Pharmacy of Stanford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F. 2d. 502 (2nd. Cir. 1982); *inter alia*.

Each and every case therein cited is distinguishable factually from the instant case. The respective courts in those cases dealt with true vertical provider agreements where there was *no element of control* by the services-providers of the services-purchasers. As described by the court in *Glen Eden Hospital, Inc. v. Blue Cross and Blue Shield of Michigan*, 555 F. Supp. 337 (E.D. Mich. 1983), the "control" factor would yield a totally different conclusion by the court.

> "Certainly, if plaintiff could show that, despite the structure, Blue Cross's reimbursement system is actually controlled by hospitals, the conspiracy requirement [for Sherman Act price fixing violation] would be met." [555 F. Sup. 337, 342 (explanatory insert supplied)].

The control of Blue Cross by the "participating hospitals" in this case is obvious, and it destroys the "vertical" buyer-seller link relied upon by Blue Cross in arguing against application of *per se* rules. The relationship between Blue Cross and its "participating hospitals" then assumes horizontal dimensions, calling for a *per se* application in the manner of *Maricopa*. The Fifth Circuit discerned this from the evidence produced at trial, and found that St. Bernard made a *prima facie* case of price-fixing, a *per se* violation of the Sherman Act. *Socony Vacuum, supra., Maricopa, supra.*

The practical effect of the disparate terms contained in the "contracting hospital agreement," such as Blue Cross's contract with St. Bernard, is to indeed fix the price of medical services to patients. If a "contracting hospital" charges more than the average charges of the "participating hospitals," it suffers financial ruin in the form of

substantial rebates. Blue Cross justifies this as "cost containment." If that were true, there would be incentives for a "contracting hospital" to charge *less* than the average charges of the "participating hospitals." However, there are absolutely no such incentives—only a dollar-for-dollar reimbursement.

If "cost containment" were truly the goal of Blue Cross's contract structure, then why is every "participating hospital" reimbursed for 100% of its charges regardless of their relationship to the average charges of all "participating hospitals?" What are their incentives for holding down the price of their charges?

The Fifth Circuit recognized that the factual context of this case fit it squarely under the rationale of *Maricopa*, despite the very subtle factual distinctions:

> "Yet *Maricopa* does, without question, negate the logic employed in the district court here that a price fixing scheme can be legal if its effects further the public interests." 712 F. 2d 978, 987.

CONCLUSION

The control exercised by the nine "participating hospitals" over Hospital Service Association of New Orleans, Inc. justified the court's conclusion that "this case presents a more egregious scheme of anticompetitive behavior than even *Maricopa*," *supra*.

This control found by the Fifth Circuit distinguishes this case from other cases cited by applicant wherein the court found that Blue Cross and Blue Shield were merely encased in a legal vertical price fixing arrangement.

It is significant to note that the facts of this case distinguish it from those which involve vertical, buyer-seller agreements, without elements of control by one party or the other. The instant case does not have national significance.

Applicants attempted to sway the Court by noting that numerous other cases were pending in the New Orleans area and could be affected by the decision in this case. However, applicant has failed to inform the Court of developments in those cases shortly after their application was filed with this Court. The "other" pending cases were settled by applicants herein shortly after their petition for writs was filed. The writ application in this case should be denied.

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